

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STEVEN M. DENENBERG,)	
)	
Plaintiff and)	8:07CV150
Cross Plaintiff,)	
)	
vs.)	FINDINGS AND
)	RECOMMENDATIONS
BORKO B. DJORDJEVIC,)	
)	
Defendant and)	
Third-Party Plaintiff,)	
)	
vs.)	
)	
JOHN OSAKA,)	
)	
Third-Party Defendant,)	
)	
and)	
)	
DOCTORS SURGERY CENTER,)	
d/b/a Surgeontothestars.com)	
)	
Third-Party Defendant and)	
Cross Defendant.)	

This matter is before the undersigned magistrate judge *sua sponte*. The undersigned magistrate judge entered an order requiring Borko B. Djordjevic to show cause why his action against John Osaka should not be dismissed pursuant to [Fed. R. Civ. P. 4\(m\)](#). **See** [Filing No. 89](#). Mr. Djordjevic did not file a response. For the reasons set forth below, the undersigned magistrate judge will recommend Mr. Djordjevic's Third Party Complaint as against John Osaka be dismissed without prejudice.

BACKGROUND

Mr. Djordjevic filed the Third Party Complaint in this matter on June 8, 2009. **See** [Filing No. 59](#). Upon Mr. Djordjevic's request, the court extended the deadline to serve all third-party defendants until July 24, 2009. **See** [Filing No. 63](#); **see also** [Fed. R. Civ. P. 4\(m\)](#)

(establishing a 120-day time limit for service of process on a defendant in a civil case, absent a showing of good cause). The court issued summonses for service of the Third Party Complaint. **See** [Filing No. 60](#). Two of the third-party defendants were served. However, there is no evidence of service upon John Osaka. On January 27, 2010, after the court granted one third-party defendant's motion to dismiss, the undersigned magistrate judge entered an order requiring Mr. Djordjevic to show cause why this action should not be dismissed pursuant to [Fed. R. Civ. P. 4\(m\)](#). **See** [Filing No. 89](#). The court gave Mr. Djordjevic until February 12, 2010, to file proof of service on John Osaka or show cause why John Osaka should not be dismissed for failure to prosecute. As of the date of these Findings and Recommendations, Mr. Djordjevic has not filed a response to the show cause order.

ANALYSIS

Federal Rule of Civil Procedure 4(m) provides:

If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

See [Fed. R. Civ. P. 4\(m\)](#). The Eighth Circuit has long held dismissal for failure to prosecute is well within the court's discretion. **See** [Roberts v. Missouri Div. Of Employment](#), 636 F.2d 249, 250 (8th Cir. 1980). Dismissal without prejudice is appropriate when service of the summons and complaint has not been made upon the defendant within 120 days after filing of the complaint. **See** [Fed. R. Civ. P. 4\(m\)](#); [Bullock v. United States](#), 160 F.3d 441, 442 (8th Cir. 1998) (per curiam) (affirming district court's dismissal without prejudice under Rule 4(m)); **see also** [Carmona v. Ross](#), 376 F.3d 829, 830 (8th Cir. 2004) (dismissal affirmed where plaintiff given opportunity, but failed to cure defect).

In this case, Mr. Djordjevic has failed to effect service of summons and the complaint upon John Osaka in accordance with Rule 4(m). Mr. Djordjevic failed to provide

the court with any explanation for the failure to serve John Osaka. Mr. Djordjevic has not complied with the court's order to show cause why the action should not be dismissed against John Osaka. Mr. Djordjevic has acted in a manner that interferes with the orderly processes of this court. The undersigned magistrate judge finds Mr. Djordjevic's failure to prosecute his action interferes with the orderly administration of justice. Upon consideration,

IT IS RECOMMENDED TO CHIEF JUDGE JOSEPH F. BATAILLON that:

Mr. Djordjevic's Third Party Complaint ([Filing No. 59](#)) be dismissed as to John Osaka, without prejudice, pursuant to Federal Rule of Civil Procedure 4(m).

ADMONITION

Pursuant to [NECivR 72.2](#) any objection to these Findings and Recommendations shall be filed with the Clerk of the Court within fourteen (14) days after being served with a copy of this these Findings and Recommendations. Failure to timely object may constitute a waiver of any objection. The brief in support of any objection shall be filed at the time of filing such objection. Failure to file a brief in support of any objection may be deemed an abandonment of the objection.

Dated this 1st day of March, 2010.

BY THE COURT:

s/ Thomas D. Thalken
United States Magistrate Judge

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